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No. 1253

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In The Supreme Court of The United States

October Term, 1967

HANS KRAMM,

Petitioner,

vs.

WORKMEN'S COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; STRAIGHTLINE MASONRY COMPANY, a corporation; HARTFORD ACCIDENT & INDEMNITY COMPANY, a corporation authorized to do business in the State of California,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT HARTFORD ACCIDENT & INDEMNITY COMPANY, BRIEF IN OPPOSITION

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ARGUMENT

I

Respondent, Hartford Accident & Indemnity Co., has set forth in detail the facts of this case in its ANSWER TO PETITION FOR WRIT OF REVIEW filed with the Court of Appeal, Fourth Appellate District, State of California, Division One. It is included in the original record of that court forwarded to the Honorable Justices of the Supreme Court of the United States March 6, 1968 in connection with the Petition for Writ of Certiorari to the Supreme Court of the State of California. Respondent, Hartford Accident & Indemnity Co., finds significant omissions in the statement of the case presented in the instant petition. However, it is believed that the factual elements of the case are irrelevant to the question now pending before the Honorable Court. It is sufficient to point out that these facts, through the earlier briefs of this respondent and the petitioner, with appendices thereto, were fully presented to the courts of the State of California, at which time they were relevant.

Complete exposition of the facts show substantial evidence to support the decision of referee below, Petitioner, having the burden of proof, failed to show a proximate relationship between the minor incident in August 1965, followed by unbroken normal activity and heavy labor for ten months, and the surgery of June 1966.

The questions presented to this Court by petitioner are so broadly phrased that they are not relatable to the issues truly involved in the case. When petitioner's brief is analyzed in full, the primary question presented appears to be whether the record of the case heard by a Workmen's Compensation Appeals Board hearing referee is sufficient to enable decision by the California Court of Appeal upon Petition for Writ of Review that is consistent with the due process clause of the Fourteenth

Amendment. Petitioner makes constant reference to the absence of a transcript and the absence of the record at the stage when the California Court of Appeal or the California Supreme Court will exercise its discretion in rejecting or accepting further limited review of Workmen's Compensation Appeals Board hearings available under the law.

Basic response that must be made to the instant petition is that:

1. There is no showing of a request by petitioner for the available transcript.

2. There is no showing by petitioner of unavailability of transcript for any reason.

3. There is no showing of prejudice to this petitioner in this case by reason of transcript of proceedings not having been prepared.

Petitioner's summary of the procedural history of review in this case is accurate as to dates, but does not reveal the record actually available to the various reviewing courts at the time of exercise of discretion.

The record of the instant case, insofar as relevant to the issues presented, was fully placed before the California courts.

The record of the District Court of Appeal, Fourth Appellate District, State of California, has been transmitted to this Honorable Court for purposes of the Petition for Writ of Certiorari. The record contains petitioner's PETITION FOR WRIT OF REVIEW, as well as this respondent's ANSWER TO PETITION FOR WRIT OF REVIEW, and the answer of respondent Workmen's Compensation Appeals Board of the State of California. The PETITION FOR WRIT OF REVIEW incorporates

as exhibits the original PETITION FOR RECONSIDERATION, dated May 15, 1967, the REPORT OF REFEREE ON PETITION FOR RECONSIDERATION, dated May 29, 1967, this respondent's ANSWER TO PETITION FOR RECONSIDERATION, dated May 29, 1967, the TRIAL REFEREE'S SUMMARIES OF THE TESTIMONY, for hearings December 6, 1966, and February 14, 1967, and the OPINION OF REFEREE ON DECISION, dated April 21, 1967. In addition, there is in petitioner's and in respondent's briefs before those courts considerable documentary evidence, including all such evidence favorable to petitioner.

Five witnesses testified in the two hearings, including petitioner Hans Kramm, his employers Mr. Lee and Mr. Kiplinger, a co-worker, Mr. Johns, and petitioner's own doctor, Doctor Du Vigneaud, who was under subpoena by this respondent. The testimony by witnesses is summarized in great detail by the referee and is included in the PETITION FOR WRIT OF REVIEW.

It is to be noted that the inaccurate factual summary inadvertently submitted by the attorneys for the Workmen's Compensation Appeals Board, referred to on pages 14 through 17 of the PETITION FOR WRIT OF CERTIORARI, did not appear in the case as the words of the original hearing referee. Any erroneous recitals that existed were apparent and made ineffectual by the accurate statements made by this respondent, the trial referee's summary of testimony, and by petitioner's own statement in the PETITION FOR WRIT OF REVIEW.

At no time in the process of review in this case has petitioner taken issue with this respondent's factual summaries, or with the referee's summary of the evidence, or in the referee's recapitulation of evidence in the referee's REPORT. In fact, petitioner included the summaries of the referee as well as the summaries of this respondent as an exhibit supporting his original PETITION FOR WRIT OF REVIEW.

At no time in the process of review in this case has petitioner suggested in specific terms that the untyped transcript, available to him as indicated hereinafter, is contrary to the factual summaries of this respondent and the referee.

Medical issues were extensively involved. The basic documentation relied upon by petitioner is in the PETITION FOR WRIT OF REVIEW as exhibits, which went to both the Court of Appeal and the Supreme Court of California. The testimony of petitioner's own treating physician was not transcribed, as it could have been upon petitioner's request, nor was it even mentioned in paraphrase by petitioner except by fleeting references.

The complete record is available to a party for presentation at all levels of review, including the time of submission for Writ of Review. Contrary to inferences which might be raised by the PETITION FOR WRIT OF CERTIORARI on page 3, lines 23 to 25, and again on page 8, lines 19 through 23, a full record by a court reporter is kept in each litigated case before a referee of the Workmen's Compensation Appeals Board. California Labor Code, §5708. This was done in the instant case.

The California Labor Code, § 5307, authorizes Rules of Practice and Procedure by the Workmen's Compensation Appeals Board. In rules issued pursuant to this authority, it is provided that the transcript, in whole or in part, is available at the request and expense of the litigant. Title 8, California Administrative Code, § 10740. California Labor Code §127(a). Such transcript, in whole or in part, may be incorporated as an exhibit by an aggrieved party petitioning for reconsideration, and time for filing will be extended to permit filing the transcript. Title 8, California Administrative Code, § 10846. The transcript is similarly available upon Petition for Writ of Review.

As recommended in a basic practice book in this field, when filing a Petition for Reconsideration, and a party determines

> ". . . the Referee's Summary of Testimony is inaccurate or insufficient, the petitioner should immediately order a transcript of testimony and allege in the petition that the panel's review of the transcript is essential to its evaluation of the case."
> California Workmen's Compensation Practice, p. 324 (California Continuing Education of the Bar.) 1963.

II

California law provides for review of a decision by referee upon Petition for Reconsideration to the Appeals Board. Consideration has been given to the requirements of due process at that level in decisions by the Supreme Court of California. In Allied Comp. Insurance Company v. IAC (Lintz), 57 Cal.2d 115, 120 (1961) it was stated that the requirements of due process are met if the panel merely achieves "a substantial understanding of the record by any reasonable means, including the use of the referee's summary." A prominent writer in this field states:

> "In other words, in connection with reversal of a decision, a review of the transcript is no longer required reading for the panel, providing the report of the referee fully and fairly sets forth the facts of the case. If it can be shown that such report contains material defects and is inadequate, the review of a transcript to test the accuracy and completeness of the summary is still obligatory."
> 1 Hanna California Law of Employee Injuries and Workmen's Compensation (Second Edition) 5-60.

California Labor Code § 5313 provides for a mandatory summarization of evidence, as follows:

> ". . . Together with the findings, decision, order or award, there shall be served upon all the parties to the proceedings, a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made."

Title 8, California Administrative Code, Rule 10586 expands upon the contents of the summary of the evidence, and provides inter alia:

> "Section 10586. (a) (3) A fair and unbiased summary of the testimony given by each witness, and any stipulations entered into between the parties; . . ."

Verbatim record of the original hearing is required by California law. California Labor Code § 5708 provides:

> "All hearings and investigations before the Appeals Board or a referee are governed by this division and by the Rules of Practice and Procedure adopted by the Appeals Board. In the conduct thereof they shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division. All oral testimony, objections, and rulings shall be taken down in shorthand by a competent

phonographic reporter."

Testimony is not normally transcribed, except at the request of the party who may wish it to be. Title 8, California Administrative Code § 10740 provides:

> "Testimony taken at hearings in compensation proceedings ordinarily will not be transcribed, except upon the request of a party accompanied by the statutory fee."

Title 8, California Administrative Code, § 10750 provides:

> "The record of a proceeding shall consist of the pleadings, minutes of hearing, summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a proceeding, notices, petitioners, briefs, findings, orders, decisions and awards."

Notes of the reporter, transcribed or untranscribed, are kept for a minimum period of six years, with further retention in special circumstances. Title 8, California Administrative Code, § 10762.

From the above provisions it may be seen that petitioner's citation of NLRB v. Southern Transport, Inc., 355 F.2d 978 (1966) is irrelevant to the issue before the court.

III

The existence of an extensive summary of the testimony, which was in this case incorporated as an exhibit to the PETITION FOR WRIT OF REVIEW submitted by petitioner to the Court of Appeal, eliminates any possible prejudice which could

exist to petitioner. In addition, the existence of such summary meets the standard established for criminal proceedings by this court in Griffin v. Illinois, 351 U.S. 12 (1956) and Draper v. Washington, 372 U.S. 487 (1963), both cited by petitioner in his brief. This Honorable Court held in the latter case that a state need not purchase a stenographer's transcript in every case where a criminal defendant cannot buy it. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the event at trial from which the appellant's contentions arise. These alternative methods may include a stipulated statement by the parties, a full narrative statement such as one taken from a trial judge's minutes noted during trial or on the court reporter's own transcript notes, or even by bystanders' bill of exceptions. Moreover, the court indicated the state was not required to furnish parts of the transcript not germane to the issues.

IV

Citations utilized in the PETITION FOR WRIT OF CERTIORARI are largely irrelevant to the issues raised. In passing it may be commented that those matters involving the National Labor Relations Board as a party were directed to standards applicable under the National Labor Relations Act and the Administrative Procedure Act of the United States. Insofar as any of the decisions inferentially bear upon the application of the substantial evidence rule, it is to be noted that the California Supreme Court has enunciated this somewhat differently than petitioner. We find that in Phoenix Indemnity Co. v. IAC, 31 Cal.2d 856 (1948) the holding that findings of the Commission, (now Workmen's Compensation Appeals Board) will not be disturbed upon appeal where they are supported by substantial evidence, or by inferences which may be fairly drawn from the evidence.

Also relevant to this case is the statutory provision that

burden of proof upon the basic issues is upon the applicant (petitioner). California Labor Code §5705.

V

Petitioner seeks certiorari in this decision primarily on the basis that there is no record to review when discretionary judicial review is sought. The authority cited above and the record of the instant case reveals this as contrary to fact. Workmen's Compensation Appeals Board referee hearings have a verbatim record, required by law, and kept in this case. Transcript of this record is available upon timely request, but was not requested in this case by petitioner. Adequate version of testimony is required in a referee's summary, which was kept in this case. No inaccuracy of the referee's summary is suggested by petitioner. The summary of the referee, along with other pertinent exhibits, can be presented to the Court of Appeal upon Petition for Writ of Review at the initiative of counsel, and were in fact presented in this case. The decision of referee complied with the substantial evidence rule. Petitioner has not been prejudiced, and is not procedurally prejudiced under the laws and administrative procedures required in Workmen's Compensation hearings in the State of California. There is no federal question of substance, nor is there a decision by the California Court that is not in accord with the applicable decisions of this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

SIDNEY A. STUTZ

Counsel for Respondent
Hartford Accident &
Indemnity Company